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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
individually and as Representatives
of the Class of Reston,
Virginia Homeowners,
Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

The American Bar Association is a wholly voluntary bar association whose membership is open to the members of the bar of the states, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 185,000 members. The purposes of the Association include the

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* This brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

promotion of the administration of justice, the maintenance of representative government, the application of the knowledge and experience of the profession to the promotion of the public good, upholding the honor of the profession of law, and the promotion of various activities of state and local bar associations throughout the nation in the interests of the public and of the profession. There is no more important activity of the Association in furtherance of these purposes than the development and promulgation of professional standards. *Amicus* is deeply committed to the proposition that such standards are essential to the preservation of the quality and integrity of the legal profession.

The significance of this case is far greater than the specific issues presented. The Court's interpretation of the relationship between the antitrust laws and traditional restrictions on professional conduct will of necessity affect the ability of bar associations to regulate the conduct of attorneys. Both as an entity devoted to the development of ethical standards and as a representative of its members, *amicus* has a substantial interest in preserving the important social objectives served by professional regulation.

QUESTIONS PRESENTED

In granting a writ of certiorari in the case, the Court certified three questions for plenary review: whether minimum fee schedules promulgated by bar associations are exempt from the antitrust laws by reason of a "learned profession" exemption; whether such schedules dealing with legal services performed in connection with residential real estate transactions affect interstate commerce; and whether under the facts of this case the actions of the Virginia State Bar are within the "state action" exemption of *Parker* v. *Brown,* 317 U.S. 341 (1943). This brief is concerned with only the first of these questions and does not address the "interstate commerce" or "state action" issues also certified for review.

ARGUMENT

I. ANY APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL CONDUCT MUST REFLECT THE DIFFERENCES BETWEEN THE PROFESSIONS AND ORDINARY TRADE OR COMMERCE.

A. Courts Have Consistently Recognized That The Application Of The Antitrust Laws To The Professions Involves Unique Questions And Considerations.

The antitrust laws were enacted to prevent restraints on free competition in the business world. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 141 (1961); *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 492-93 (1940). While there are similarities between the professions and commercial business, there are also significant differences, the most notable of which is the existence of ethical standards and obligations governing professional conduct. The Court has recognized that traditional modes of business competition may be destructive of the ethical standards of a profession, *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935); and all antitrust decisions in any way concerned with the professions have carefully considered the particular characteristics of the profession involved. *See, e.g., American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943); *Northern California Pharmaceutical Ass'n* v. *United States,* 306 F.2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962); *United States* v. *Utah Pharmaceutical Ass'n,* 201 F. Supp. 29 (D. Utah), *appeal dismissed,* 306 F.2d 493 (10th Cir.), *dismissal of appeal aff'd.,* 371 U.S. 24 (1962).

One such special characteristic is the existence of extensive self regulation which has long been regarded by the courts and society at large as essential to the quality and integrity of the legal profession. An important aspect of such regulation traditionally has been codes of ethics governing professional activities. By their very nature, these ethical codes restrict or restrain professional conduct in ways which would appear to conflict with antitrust precepts developed by the courts in the context of ordinary trade or commerce. Nevertheless, it has always been recognized that such restrictions serve important social values. Whether it be viewed as an exclusion from, or a different application of, the antitrust laws, the position of the professions under those laws must reflect these countervailing values.

Although this is a case of first impression in that the Court has never definitively ruled whether the antitrust laws apply to the legal profession, there are statements in the opinions of this and other courts that the provision of professional services is not "trade or commerce," a view which would place those services entirely outside the ambit of the antitrust laws. *See, e.g., Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 435-36 (1932); *Fed. Trade Comm.* v. *Raladam Co.,* 283 U.S. 643, 653 (1931); *Federal Baseball Club* v. *National League of Prof. Baseball Clubs,* 259 U.S. 200, 209 (1922); *The* [*Schooner*] *Nymph,* 18 F. Cas. 506, 507 (C.C.D. Me. 1834). In two other cases, the Court found it unnecessary to decide this question. *United States* v. *National Ass'n of Real Estate Bds.,* 339 U.S. 485, 490-91 (1950); *American Medical Ass'n* v. *United States,* 317 U.S. 519, 528 (1943).[1] Whatever may be the preceden-

[1] Petitioners incorrectly assert that this case is "squarely within the ruling" of *American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943). In *AMA,* two medical associations were charged with conspiracy to hinder and obstruct the operation of a group health corporation. The court determined that the corporation was "engaged in business or trade" and held that if ". . . the indictment charges a single conspiracy to restrain or obstruct *this business* it charges a conspiracy in restraint of trade or commerce . . ." 317 U.S. at 528 (emphasis supplied). The Court expressly declined to consider or decide "the question whether a physician's practice of his profession constitutes trade" under the Sherman Act. 317 U.S. at 528. The present case involves no conspiracy, the purpose of which is to restrain a commercial entity. Rather, the restraint is allegedly imposed directly on the relationship between attorneys and their clients. Plainly the question presented by this case is the question expressly reserved in the *AMA* decision.

tial value of these cases, they reflect long standing recognition of the unique considerations and questions involved in any application of the antitrust laws to the professions. As Judge Kaufman recently stated in *Emle Industries, Inc.* v. *Patentex, Inc.,* 478 F.2d 562, 575 (2d Cir. 1973):

> "It is hardly appropriate to cast aside ethical responsibilities out of an excess of antimonopolistic fervor."

The unique characteristics of the professions were so widely and firmly accepted that antitrust challenges to self regulation of the legal profession have occurred but recently. Only within the last two years have courts considered such challenges, and the general conclusion has been that the legal profession is at least partially excluded from the operation of the antitrust laws. In *Stafford* v. *Brennan,* 498 S.W. 2d 703, 707-08 (Tex. Civ. App. 1973), the court relied upon such an exclusion in holding that the use of a minimum fee schedule was consistent with the Sherman Act. Similarly, the New York Court of Appeals recently upheld a minimum fee schedule under a state antitrust law similar to the Sherman Act on the ground that some partial exclusion is implicit in the law. *Lincoln Rochester Trust Co.* v. *Freeman,* 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974). A limited professional exclusion was also invoked by the Fourth Circuit in this case:

> "Throughout the development of federal antitrust law there has been judicial recognition of a limited

exclusion of 'learned professions' from the scope of the antitrust laws. This exclusion is not a favor bestowed upon professionals by the courts as a 'professional courtesy'; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered." 497 F.2d at 13.

In the recent decision in *United States* v. *Oregon State Bar,* (D. Ore., No. 74-362, November 22, 1974), the court held that the "fee schedule activities" in question were "not immune to Sherman Act attack. . . by the 'learned profession' exemption." (Decision and Order, p. 19) This decision, however, did not indicate that the antitrust laws should be applied to the professions in the same manner they are applied to the business world. Indeed, the decision acknowledged that the antitrust laws may have to be applied to the legal profession in only a limited fashion; and accepted both this Court's recognition of the differences between the professions and the business world and the need carefully to consider those differences in determining the application of the antitrust laws to the profession in question. (*Id.,* pp. 14-18) Although that court, in weighing those considerations, found the antitrust laws applicable to the facts involved in that case, the decision does stand for the more general proposition espoused by *amicus* that any application of the antitrust laws must reflect the unique characteristics of the legal profession.

These cases are consistent with a variety of other contexts in which the courts have found the antitrust laws inapplicable to challenged restraints arising in connection with special professional services. *See, e.g., Marjorie Webster Jr. Col.* v. *Middle States Association of C. & S.S.,* 432 F.2d 650 (D.C. Cir.), *cert. denied,* 400 U.S. 965 (1970); *Riggall* v. *Washington County Medical Society,* 249 F.2d 266 (8th Cir. 1957), *cert. denied,* 355 U.S. 954 (1958); *Nankin Hospital* v. *Michigan Hospital Service,* 361 F. Supp. 1199

(E.D. Mich. 1973); *Meyer* v. *Massachusetts Eye and Ear Infirmary,* 330 F. Supp. 1328 (D. Mass. 1971). In such situations, the courts have not sought totally to immunize professional conduct from scrutiny under the antitrust laws. On the contrary, they have recognized that restrictions arising in connection with professional services which are inconsistent with the objectives of an exclusion and which have the purpose or effect of restraining commerce are subject to those laws. *See, e.g., American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943); *Levin* v. *Doctors Hospital, Inc.,* 354 F.2d 515 (D.C. Cir. 1965). These cases do, however, contain ample support for the proposition that an exclusion, or some other mechanism, must exist to harmonize necessary professional regulation with antitrust principles developed in the context of ordinary trade or commerce.

B. Failure To Differentiate Between The Professions And Ordinary Trade Or Commerce Could Transform Numerous Professional Practices Of Unquestionable Social Worth And Legality Into Federal Antitrust Violations.

An interpretation of the antitrust laws which fails to reflect the unique characteristics of the professions could render illegal fundamental limitations on professional conduct which our society has always regarded as highly desirable. There is perhaps no better illustration of the need to exclude certain professional conduct from a mechanical application of the antitrust laws than to enumerate some of the principles of professional ethics that such an application could cause to be unlawful.

An agreement among competitors to restrict advertising of prices is a form of "price-fixing" and is a per se violation of the Sherman Act. *United States* v. *Gasoline Retailers Association, Inc.,* 285 F.2d 688 (7th Cir. 1961). Yet, strong

and well-established policy considerations support such restrictions on professional advertising. *See, e.g., Jacksonville Bar Association* v. *Wilson,* 102 So. 2d 292 (Fla. 1953); Cheatham, *Cases and Materials on the Legal Profession* at 525 (2d Ed. 1955). Similarly, an agreement among competitors to refrain from soliciting each other's customers is unlawful per se. *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972). But hostility to the practices of barratry, maintenance, and champerty has traditionally justified strict limitations upon solicitation by attorneys. The Court has itself recognized that advertising and solicitation may be incompatible with an attorney's professional responsibilities. *Cohen* v. *Hurley,* 366 U.S. 117, 124 (1961).

Competitors who agree to limit maximum prices also commit a per se offense. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951). But the activities of the legal profession to insure that practitioners refrain from overcharging, including the use of limitations on maximum fees, have always been considered proper and, indeed, essential. *See State ex rel. Nebraska State Bar Ass'n* v. *Richards,* 165 Neb. 80, 84 N.W.2d 136 (1957); *State ex rel. Lee* v. *Buchanan,* 191 So. 2d 33 (Fla. 1966). Moreover, an agreement among competitors not to price on a contingent basis would certainly run afoul of the prohibition against any concerted action which limits pricing alternatives, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); but society has always considered it highly undesirable for attorneys to accept criminal cases on a contingent fee basis. *See Peyton* v. *Margiotti,* 398 Pa. 86, 156 A.2d 865, 867-69 (1959). Under *Socony-Vacuum* even prohibitions against fee splitting would appear to be illegal.

Many of the same ethical principles govern the medical profession. In addition, doctors must frequently decide whether to purchase or utilize vital goods and services. A

concerted refusal to deal is a per se violation of the Sherman Act, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959)[2]; but, as one Federal Trade Commissioner has observed, few would automatically apply such a rule to physicians in a medical society refusing to prescribe untested drugs, to use inferior surgical instruments, or to send patients to a substandard private hospital. *Community Blood Bank of the Kansas City Area, Inc.,* 70 F.T.C. 728, 948-58 (1966) (dissenting opinion of Commissioner Elman), *reversed sub nom., Community Blood Bank of Kansas City Area, Inc.* v. *F.T.C.,* 405 F.2d 1011 (8th Cir. 1969). Moreover, the highly specialized and technical nature of the medical profession often requires peer review of the adequacy of an individual practitioner's performance. Such review of a doctor's performance by his fellow practitioners is designed to restrict, indeed eliminate, the delivery of inferior medical services, but certainly no one would prefer that the review be conducted solely by less qualified parties.

It is clear from these examples that a mechanical application of the antitrust laws to the professions would be completely inconsistent with objectives which society has long felt desirable. There is no support in the case law, in legislative history or in sound public policy for the Court to approve such a radical departure from established principles.

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[2] Although concerted refusals to deal are denominated per se violations, there are of course certain narrow defenses and exceptions to this per se rule. *See, e.g., Swift & Co.,* v. *United States,* 393 F.2d 247 (7th Cir. 1968); *United States* v. *Sugar Institutes,* 15 F. Supp. 817 (S.D.N.Y. 1934), *modified on other grounds,* 297 U.S. 553 (1936). However, it is highly questionable whether the very narrow exception afforded ordinary business enterprises would adequately serve the needs of the medical profession. A rule of law which declared that any concerted action by doctors directed against a drug manufacturer or an uncertified hospital would violate the antitrust laws and allowed only such a narrow defense would undoubtedly deter good faith efforts by medical practitioners to preserve and improve the quality of medical services.

C. Petitioners And The Department Of Justice As *Amicus Curiae* Concede That The Professions Require Specialized Treatment Under The Antitrust Laws.

Both petitioners and the Department of Justice concede that, to some extent, the antitrust laws must differentiate between the professions and ordinary trade or commerce. Petitioners, in their petition for a writ of certiorari, have argued that it is only "entrepreneurial" activity—not "professional" activity—that is subject to the antitrust laws. (Petition at 20.) Petitioners' brief presently before this Court takes an additional approach which also implicitly recognizes the need for specialized treatment of the professions. Petitioner would concede that "Outside the area of *per se* violations . . . the courts may properly consider the professional status of the participants." (Brief at 45.) Alternatively, petitioners would distinguish between the "commercial" and "non-commercial" aspects of legal practice as a part of the proper interpretation of the Sherman Act. (Brief at 41-43.)

The Department of Justice, in its brief *amicus curiae* supporting the petition for a writ of certiorari, has acknowledged that it may be appropriate to modify the "traditional criteria in applying the Sherman Act to a profession," but has urged that there is no occasion to do so when dealing with fee schedules. (Brief at 7-8.) The Department would adopt a "commercial/non-commercial" distinction in applying the antitrust laws. (Brief at 6-7.) The Department's brief *amicus curiae* on the merits also supports such a distinction. (Brief at 28.)

As demonstrated *infra*, the distinctions offered by petitioners and the Department do not survive careful analysis. Nonetheless, it is significant for present purposes that even these parties agree that the professions require a different

application of, or an exclusion from, the antitrust laws. The only disagreement concerns the criteria to be employed to determine the scope of that exclusion or application.

II. ANY APPLICATION OF THE ANTITRUST LAWS TO THE PROFESSIONS MUST BE CONSISTENT WITH THE NEED FOR SPECIALIZED RESTRICTIONS ON PROFESSIONAL CONDUCT.

A. A Workable Exclusion Cannot Be Confined To "Non-commercial" Activities.

Petitioners and the Department of Justice argue that whatever may be the justification for a professional exclusion, no such exclusion should encompass "entrepreneurial" or "commercial" activities. This approach, while superficially appealing, should be rejected for at least two reasons.

In the first place, it makes little sense to distinguish between "commercial" and "non-commercial" or "entrepreneurial" and "professional" aspects of legal practice. Every service performed by an attorney for a private client is of necessity both commercial and professional. Consequently, every limitation on professional conduct (whether it be a prohibition against conflicts of interest or a fee schedule) is in some sense commercial. At the same time, virtually all such limitations serve professional rather than commercial purposes.[3]

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[3] There is one use of a commercial/non-commercial distinction which may provide a workable test. *Marjorie Webster Jr. Col.* v. *Middle States Association of C. & S.S.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) contains *dicta* to the effect that restraints on professional services which serve solely commercial purposes may violate the antitrust laws. 432 F.2d at 654-55. Assessing restrictions on professional conduct by determining whether they serve "professional" or "commercial" *purposes* would closely parallel the proposed test advanced by *amicus* in this brief. Such a test is very different from an attempt to classify *aspects* of the practice as commercial and determining that the antitrust laws are fully applicable to such aspects regardless of the professional values served by restrictions on such aspects.

Under these circumstances, the offered distinction would not be a workable principle of decision. Confronted with various challenges to restrictions on professional conduct, lower courts would be unable rationally and consistently to determine which practices were commercial and which were professional.

More importantly, even if a principled method of classifying commercial and non-commercial aspects of the practice could be elaborated, some of the most commercial elements of the practice are the very aspects that require the most circumspect professional regulation. Prohibitions against excessive fees, fee splitting or contingent fees in criminal matters are every bit as commercial as fee schedules. Indeed, they are all part of exactly the same "aspect" of the practice—the determination of the fee charged a client. Similarly, it is difficult to discern why restrictions on solicitation are any less commercial than restrictions on the manner in which fees are established.

Equally unworkable is petitioners' suggestion that the antitrust laws should not apply to mere restraints on competition among attorneys, but should apply if those restraints affect the public or some aspect of commerce. (Petition at 19; Brief at 39-41.) The flaw in this approach is that almost every restriction upon professional conduct affects the relations of attorneys with other parties and hence indirectly affects the public.[4] Rules relating to barratry, champerty, solicitation and fee splitting have a direct impact upon clients and prospective clients. Yet, such an impact should not be sufficient to cause the antitrust laws

[4] Petitioners find such an effect in the present case only in that the restraint allegedly operated "to limit the choice of home buyers in the Northern Virginia-Washington D.C. area and to restrict the movement of interstate mortgage money." (Brief at 40.)

to supersede legitimate restrictions traditionally imposed on the professions.

Finally, petitioners assert that the antitrust laws should be fully applicable to restrictions on professional conduct which would be per se violations in the context of ordinary commerce. In petitioners' view, the values of professional regulation would be adequately served by applying the rule of reason to all other restrictions. However, as demonstrated *supra* at pp. 7-9, many of the restrictions on professional conduct long deemed essential by society could be characterized as per se violations under traditional antitrust analysis. Moreover, the mere application of the rule of reason without some sort of test similar to the one advocated by *amicus* would provide no guidance for lower courts and would require each future case to be decided on an essentially *ad hoc* basis.

B. The Antitrust Laws Should Be Applied Only To Those Restrictions On Professional Conduct Which Are Not In Furtherance Of Legitimate Regulatory Objectives And Which Have The Purpose Or Effect Of Restraining Commerce.

The need for limitations on professional conduct could be harmonized with federal antitrust policy by the adoption of the following test:

> Actions which restrict professional conduct are permissible under the antitrust laws unless
>
> 1. the actions are not in furtherance of legitimate objectives of professional regulation; and
> 2. the actions have the purpose or effect of restraining commerce.[5]

[5] This test must necessarily include this second element since an insignificant restraint which may not be justified by legitimate self-regulatory objectives should not be illegal unless it has the purpose or effect of restraining commerce.

This test serves the needs of the antitrust laws while preserving the objectives of professional regulation such as maintenance of the quality of services and preservation of the integrity of the profession.[6] *See, generally,* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason,* 66 Colum. L. Rev. 1486 (1966).

In the somewhat analogous area of industry self regulation, the courts have generally sustained the legality of practices which are consistent with policies underpinning self regulation. For example, courts have held that the antitrust laws do not prohibit certain disciplinary or exclusionary rules of professional athletic associations. *See, e.g., Deesen* v. *Professional Golfers' Ass'n of America,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846 (1966); *Molinas* v. *National Basketball Ass'n,* 190 F. Supp. 241 (S.D.N.Y. 1961). Courts have also supported the legality of a trade association's motion picture rating code, *Tropic Film Corp.* v. *Paramount Pictures Corp.,* 319 F. Supp. 1247 (S.D.N.Y. 1970), as well as the legality of a board of trade's restrictive bylaw allocating selling time. *Roberts* v. *Fuquay-Varina Tobacco Board of Trade, Inc.,* 405 F.2d 283 (4th Cir. 1968). In none of these more commercial contexts is the public interest in the restrictions as great or as long standing as in controls upon professional conduct.

All exemptions from, exclusions from, or specialized applications of, the antitrust laws are justified by social values conflicting, in part, with those laws; but each may be lost if conduct is not consistent with policies underlying

[6] Such a test would require the courts to assess the purposes and objectives of particular restrictions on professional conduct. Such an assessment is commonplace in decisions under the Sherman Act. Contrary to the suggestion of the Department of Justice at page 27 of its Brief *Amicus Curiae,* such a test would not turn on the actual motivation of the parties promulgating a particular restriction although such motivation could of course constitute evidence of the purpose of the restriction.

the exemption, exclusion or specialized application. *E.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). Concerted efforts to influence legislative or administrative action are exempt from the antitrust laws, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); but the exemption has been lost by persons who abused their right of access to the government since such conduct was not within the legitimate objectives of the exemption. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972). Similarly, the Webb-Pomerene Act, 15 U.S.C. §§ 61-65, exempts certain restrictive practices arising in the course of export trade. Its purpose is to permit American firms to compete in a cartelized world; and accordingly, the exemption can be lost if the export mechanism is used to regulate domestic supply and price. *United States* v. *Phosphate Export Ass'n,* 393 U.S. 199, 207 (1968); *United States* v. *United States Alkali Export Ass'n,* 86 F. Supp. 59 (S.D.N.Y. 1949). Finally, the purpose of the labor exemption is to facilitate and encourage the collective determination of wages and working conditions. The exemption has thus been denied "independent contractors," *United States* v. *Hutcheson,* 312 U.S. 219 (1941), as well as a union collaborating with an employer to destroy the employer's competitors. *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965).

The proposed test resembles the approach used in the exemption cases as well as the approach used in the trade association cases. It may be viewed either as a limited exclusion of the professions from the antitrust laws or merely as a formula for modifying the criteria which are used in applying the antitrust laws to ordinary trade or commerce. In either event, its function is to reconcile competing social values.

Petitioners have argued that the creation of an exemption for the legal profession from the Sherman Act is the

exclusive province of Congress and not for the courts. (Brief at 32-34.) The adoption of the proposed test, however, would not require the creation of such an exemption, but would merely constitute an authoritative determination of the meaning of the very general language of the antitrust statutes. The Court is not confronted with the case of an industry clearly within the scope of the antitrust laws for which a specialized exemption must be created. *E.g., Parker* v. *Brown,* 317 U.S. 341 (1943). Rather, the Court is faced with the threshold question of whether the antitrust laws were ever intended to apply to the legal profession, and if so, the manner in which they should be so applied.[7] Such judicial construction of a statute has always been held to be within the legitimate powers of the courts. *See Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.,* 305 U.S. 315 (1938); *Atlantic Cleaners & Dyers, Inc.* v. *Leader,* 286 U.S. 427 (1932).

Petitioners have also argued that there is no need for an exclusion or specialized rule of application since activities of the professions properly regulated by the states would already be exempt under *Parker* v. *Brown,* 317 U.S. 341 (1943). (Brief at 45.) Such an argument, however, ignores both the history and realities of professional self regulation. Private national bar associations such as *amicus* have taken the lead in developing ethical standards and in harmonizing standards proposed and developed by state associations. More importantly, many states have chosen to regulate the legal profession by means of private or quasi-private state and local bar associations. The Sherman Act

[7] While *amicus* recognizes that the various judicial statements, cited *supra* at p. 4, to the effect that the professions are not trade or commerce do not constitute binding precedent, it can scarcely be maintained in light of those statements that the professions are clearly within the intended scope of the Sherman Act. Indeed, it is highly unlikely that the Congress which enacted the Sherman Act ever contemplated that it would be applied to the ethical regulation of learned professions.

was not intended and should not be interpreted to nullify such a political choice made by state governments. Moreover, the medical profession and the public interest require, in certain contexts, private peer review; and given the rapidly developing area of prepaid legal services programs, the legal profession may need to employ such review in the future.

In sum, codes of professional ethics and other self regulation are a crucial component of an integrated and complementary scheme for controlling professional conduct, maintaining standards, and protecting the public. The proper functioning of this regulatory scheme would be seriously impaired by a decision of the Court which failed clearly to recognize the particular status of the professions under the antitrust laws. Application of the mechanical tests suggested by petitioners or adoption of an entirely case-by-case mode of analysis without any clear governing principle would chill good faith efforts to control professional conduct, as well as discourage imaginative efforts to raise future standards of professionalism.

CONCLUSION

It is necessary to recognize that there are many kinds of fee schedules including schedules designed to limit excessive fees, schedules which influence the level of minimum fees, schedules used by courts in awarding fees and schedules which merely constitute historical information concerning fees. Because the policies supporting various schedules are different, each requires separate analysis. Even explicit "agreements" to set fees must be examined on an individual basis since such agreements may be justified in a few specialized contexts. For example, given the professional obligation to perform certain charitable services, bar associations should be permitted to

sponsor programs under which participating attorneys agree to perform services for low income clients at set token fees even though establishing such fees technically could be an agreement to fix prices. *See, e.g., American Bar News,* Vol. 19, No. 9 (October 1974) at 9. Similarly, the success of consumer sponsored prepaid legal services plans may depend on the agreement of participating attorneys to charge certain established fees for specified services.

While the American Bar Association has in the past supported the use of fee schedules in certain contexts,[8] it has never supported the use of such schedules to fix fees. Indeed, the Association has ruled that adherence to and enforcement of an obligatory minimum fee schedule would itself constitute an unethical practice. (Formal Opinion 28 of the A.B.A. Standing Committee on Professional Ethics, 16 A.B.A. Journal 538 (1930); Formal Opinion 171 of the A.B.A. Standing Committee on Professional Ethics, 23 A.B.A. Journal 643 (1937); Formal Opinion 323 of the A.B.A. Standing Committee on Ethics and Professional Responsibility, 56 A.B.A. Journal 1087 (1970).) The Association does believe, however, that fee schedules and agreements should be analyzed in the same fashion as other limitations on professional conduct. In assessing their legality, the Court should determine whether the justifications for the particular schedules at issue constitute legitimate objectives of professional regulation.

[8] For instance, in 1961 the Association ruled that the habitual charging of fees less than those established in a minimum fee schedule may be evidence of unethical conduct. (Formal Opinion 302 of the A.B.A. Standing Committee on Professional Ethics, 48 A.B.A. Journal 159 (1962).) In 1970, however, the Association clarified this ruling by holding that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. (Formal Opinion 323 of the A.B.A. Standing Committee on Ethics and Professional Responsibility, 56 A.B.A. Journal 1087 (1970).)

In determining the application of the antitrust laws to the professions, the social values served by particular restrictions on professional conduct should be carefully considered. Only if the Court finds that the fee schedules challenged in this case are not in furtherance of legitimate objectives of professional regulation and if it finds that the schedules have the purpose or effect of restraining commerce should it hold that the antitrust laws are applicable.

Respectfully submitted,

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